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INTRODUCTION

PARTICULARLY in recent years the movement in most jurisdictions has been in the general direction of expansion of the scope of the lawsuit.[1] Ever-increasing support is being given to the idea that, subject to considerations of convenience, efficiency, and fairness, disposition should be made of all related issues, and ultimate rights should be determined, in a single action. This movement stems from increased recognition of the need for complete availability of procedural remedies to protect effectively the interests of litigants, intertwined to a certain extent with a new appreciation of the need for more efficient judicial administration.[2]

Calendars, especially in metropolitan areas, are congested. The increase in courts and judges, and the administration and distribution of court business, generally have not kept pace with the in-

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[1] Thus, surveying the new Texas Rules of Civil Procedure in 1941, Judge Charles E. Clark commented: "The chief topic explicitly adopted [from the Federal Rules of Civil Procedure] is that of joinder of parties; here the Federal Rules 19-23 are taken over practically in entirety in local rules 39-43, though the local rule on intervention (Rule 60) is continued in place of the Federal Rule 24. It seems only fair to note, however, that free joinder of parties has now become one of the commonplaces of procedural reform, perhaps the first matter regularly taken up; and since the federal system follows that initiated by England, and adopted by many states, such as New York, New Jersey, California, and Illinois, the innovation is not great." Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 Tex. L. Rev. 4, 7 (1941). See also Millar, *Notabilia of American Civil Procedure, 1887-1937*, 50 Harv. L. Rev. 1017, 1021-1034 (1937).

[2] See Pound, *Improving the Administration of Justice*, 29 A. B. A. J. 494, 498, 499 (1943); *Principles of Practice Reform*, A. B. A. Rep. 635, 642 (1910).

crease in litigation. Even before postwar inflation, litigation was becoming increasingly expensive both to the litigant and the State which provides the judicial machinery. Today's litigation reflects the complexity of modern society. The rise of arbitration and the development of the administrative process have been given no little impetus by a lack of confidence in the court process, a lack of confidence not restricted to the layman.

Procedural rules which prevent circuity of action, multiplicity of suits, and inconsistent judgments, and which make possible a speedier and more effective adjudication of controversies, contribute to more efficient judicial administration and play at least some small part in the restoration of confidence in our present court system of adversary litigation. This article is designed to show the similarity of procedural principle underlying the various "modernized" rules relating to multiple parties and claims and to point out some of the areas still remaining for study and improvement of these rules in Texas.

I. The Similarity of Procedural Principle

The Texas Rules of Civil Procedure with respect to joinder of claims and remedies (Rule 51), the bringing in of additional parties (Rule 37), compulsory and permissive joinder of parties (Rules 39, 40), the class suit (Rule 42), impleader or third-party practice (Rule 38), interpleader (Rule 43), intervention (Rule 60), counterclaims and cross-claims (Rule 97), consolidation and separate trials (Rule 174), misjoinder and non-joinder (Rule 41)—all deal with multiple parties and/or claims situations, and certain generalizations are possible with respect to all of them:

(1) These rules all recognize that the scope of the lawsuit may be expanded beyond the adjudication of a single claim or the claims of or against a single person, for they all share as at least a partial basis of principle, the idea of permitting disposal of related issues and determination of ultimate rights in a single

action. The importance of this recognition, and of the underlying procedural principle involved, is not detracted from or diminished by the fact that the rules may differ in their operational mechanics or that some may be compulsory in their operation.

A rule is compulsory which requires that in a particular situation certain persons be made parties or that certain claims be interposed. Texas Rule 39 is a compulsory rule, for it requires that persons having a certain relationship to a controversy *must* be made parties to an action involving that controversy, and the plaintiff has no freedom of choice.[3] Texas Rule 97(a) requires the defendant to interpose a compulsory counterclaim, and the rule is compulsory in the sense that if defendant does not interpose such a counterclaim, he loses it.[4] However, most of the rules with respect to multiple parties-claims are permissive. While more of these rules could be made compulsory,[5] a compulsory rule actually need be compulsory only to the extent that a failure to join would prevent entry of a valid judgment.[6]

The compulsory-permissive dichotomy goes to the nature of the

[3] The defendant's freedom of choice is similarly limited by Rule 39, at least where an indispensable party is involved.

[4] Rule 97(a) does not expressly so state, but such has been the interpretation of Federal Rule 13(a), from which Rule 97(a) was taken. 3 MOORE'S FEDERAL PRACTICE (2d ed. 1948) ¶ 13.12. *See* Capetillo v. Burress & Rogers, 203 S. W. 2d 953 (Tex. Civ. App. 1947) *er. ref. n.r.e.* (cause of action for wrongful sequestration held not to constitute a compulsory counterclaim); Deal v. Carlton, 237 S. W. 2d 1000 (Tex. Civ. App. 1951) (court raises but does not decide question whether defendant in an action of trespass to try title must assert his equity to recover for improvements made in good faith in such action); *cf.* Leon v. Noble, 234 S. W. 2d 454 (Tex. Civ. App. 1950) (plaintiff in action for property damage arising from collision can take nonsuit, defend defendant's cross-action based on the same collision, and then file a new action based on the same collision, the court analogizing the situation to that of separate trials); *see also* Watkins v. Cossaboom, 204 S. W. 2d 56 (Tex. Civ. App. 1947) *er. dism.* (defendant's cause of action for damages arising out of collision which formed the basis for plaintiff's suit erroneously termed a "permissive" counterclaim, but treated as compulsory counterclaim for jurisdictional purposes); Ulmer v. Mackey, 242 S. W. 2d 679 (Tex. Civ. App. 1951) *er. ref. n.r.e.* (compulsory counterclaim held improperly severed because it had to be interposed).

[5] Professor Blume has suggested that the time may now be appropriate for the joinder of claims rule to be made compulsory. Blume, *Free Joinder of Parties, Claims, and Counterclaims*, 2 F. R. D. 250, 257 (1943).

[6] Thus, while the compulsory counterclaim rule is a desirable rule, all counterclaims are permissive in probably a majority of the states. See CLARK, CODE PLEADING (2d ed. 1947) § 101. Of course, even though a counterclaim be permissive, principles of col-

controversy and the multiple parties-claims relationship involved therein, and the nature of that relationship may be important in the determination of venue[7] and jurisdiction.[8] The nature of the multiple parties-claims relationship may also be an important factor with respect to trial convenience, that is, in determining whether various claims of and against the same or different persons should be tried together. The nature of the relationship, the degree of intimacy between the multiple parties-claims, does not however affect the general idea that procedural rules with respect to multiple parties-claims should be so drafted as to make possible disposition of all related issues and determination of ultimate rights in a single action.

(2) The various rules complement each other; more than one may be applicable in a given situation, or the particular rule applicable may depend upon the manner in which a particular situation develops. The correlation and integration of these rules is fully achieved, however, only by a recognition of the basic procedural principle involved. Piecemeal legislation in the field of multiple parties-claims had led in some instances to a lack of complete integration and correlation,[9] but the same may, of course, also result from restrictive judicial interpretation.

(3) Liberal rules with respect to multiple parties-claims require, as a corollary, that the trial court be given broad discretion in determining the manner of trial of actions involving multiple issues by reason of utilization of such rules, so as to prevent prejudice and unnecessary complexity and confusion. However,

lateral estoppel may preclude successful maintenance of a subsequent suit based thereon. For example, *A* sues *B* for personal injuries resulting from collision between automobiles owned and driven by them, *A* alleging that *B* was negligent. Judgment for *A* in the first action. Subsequently *B* sues *A* for his injuries resulting from the same collision. *B's* claim was a compulsory counterclaim under Texas Rule 97(a) and should have been interposed in *A's* action. The doctrine of collateral estoppel would also preclude *B* from maintaining the second action, inasmuch as it must have been found in the first action that *B* was negligent and *A* was not contributorily negligent.

[7] See Part II *infra.*

[8] *Ibid.*

[9] See Frumer, *On Revising the New York Interpleader Statutes,* 25 N. Y. U. L. Rev. 737, 740 (1950).

the question of trial convenience and whether severance or separate trials should be ordered must be kept distinct from the question of propriety in the first instance of joinder or interposition generally of additional claims. Further, the trial court's discretion cannot be unlimited. Although the tests for exercise of the trial court's discretion may be vague, and indeed it would be difficult to phrase them otherwise, it would seem clear that the discretion may be abused.[10] As is true in the law generally, the vague tests must be implemented by a clear understanding by the courts and attorneys of the purposes and objectives of these tests and the related rules.

Consider, for example, in connection with the foregoing and obviously broad generalizations, the following specific situations:

(a) *A* has causes of action against *B* for malicious prosecution and assault and battery. *A* may join both of these causes of action against *B* in his petition, seeking to recover for both in a single action whether or not they are related. Texas Rule 51 permits unlimited joinder of claims, subject only to the limitations set forth in Rules 39, 40, and 43 with respect to joinder of parties.[11] There can be no *misjoinder* of causes of action where claims are

[10] While the discretion may be abused, this is obviously an area in which it will be most difficult to obtain a reversal on such ground. A reversal is more likely to follow from the court's refusal to order separate trials than from an order for separate trials or severance. *See, e.g.*, Utilities Natural Gas Corp. v. Hill, 239 S. W. 2d 431 (Tex. Civ. App. 1951) *er. ref. n.r.e.* Where separate trials or severance has been ordered, and a separate trial has been had, the appellate court is unlikely to find the "prejudice" necessary for reversal merely from the fact that separate trial should not have been had. *See, e.g.*, upholding the trial court's action, Rose v. Baker, 143 Tex. 202, 183 S. W. 2d 438 (1944); McGee v. McGee, 237 S. W. 2d 778 (Tex. Civ. App. 1950) *er. ref. n.r.e.*; Waller Peanut Co. v. Lee County Peanut Co., 217 S. W. 2d 183 (Tex. Civ. App. 1949); Shaper v. Gilkinson, 217 S. W. 2d 878 (Tex. Civ. App. 1949) *er. ref. n.r.e.*; Simmons v. Wilson, 216 S. W. 2d 847 (Tex. Civ. App. 1949); Paul v. Houston Oil Co. of Texas, 211 S. W. 2d 345 (Tex. Civ. App. 1948) *er. ref. n.r.e.*; *but cf.* Ulmer v. Mackey, 242 S. W. 2d 679 (Tex. Civ. App. 1951) *er. ref. n.r.e.* (compulsory counterclaim improperly severed). The writer does not contend that all of these cases were improperly decided, but the cases do seem to show a trend toward liberality in permitting severance or separate trial. Such a trend, if carried too far, will to some extent nullify the purpose and objectives of the rules with respect to multiple parties-claims.

[11] Rule 51(a) provides:

Joinder of Claims. The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or

joined by a sole plaintiff in a single capacity against a defendant in a single capacity. The only question is one which arises generally in multiple parties-claims situations—whether, as a matter of trial convenience, all of the issues in the case should be tried together. With respect to separate trials, Rule 174(b) provides:

> The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.[12]

In situation (a) above, if the causes of action are related and involve at least partially the same evidence and neither is unusually complex, the court ordinarily should not order separate trials.[13] On the other hand, separate trials need not be ordered even if the claims are unrelated.[14]

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both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 39, 40 and 43 are satisfied. There may be a like joinder of cross claims or third-party claims if the requirements of Rules 38 and 97, respectively, are satisfied.

Rule 51(b) deals with joinder of remedies, and provides:

> Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by law or contract directly liable to the person injured or damaged.

Rule 51(b), derived from Federal Rule 18(b), authorizes generally the permissive joinder of a principal and contingent claim. However, Federal Rule 18(b) does not authorize joinder of a liability insurer as defendant in an action against its insured where such joinder is forbidden by state law. Pitcairn v. Rumsey, 32 F. Supp. 146 (W. D. Mich. 1940). See generally 3 MOORE'S *op. cit. supra* note 4, ¶s 18.08, 18.09.

[12] Rule 97(h) provides, "If the court orders separate trials as provided in Rule 174, judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of." Rule 41 makes provision for a severance, as opposed to separate trials. Rule 40(b) also makes provision for separate trials in permissive joinder of parties situations. However, when joinder is proper in the first instance, the power to order separate trials under Rules 40(b) and 174(b) ordinarily makes severance unnecessary in a joinder of claims situation which does not involve multiple parties. A severance may be necessary, for example, in a multiple parties situation where, though joinder is proper, the plea of privilege of one of the defendants is sustained. For discussion of venue requirements as a limitation on joinder, see Part II *infra*.

[13] See James v. Zuehlke, 218 S. W. 2d 326 (Tex. Civ. App. 1948) *er. ref. n.r.e.*, which involved related causes of action for malicious prosecution and assault and battery. The court of civil appeals noted, "We think the trial court acted wisely in trying both claims together." *Id.* at 329.

[14] The federal courts have taken the position that "a single trial generally tends to

(b) *A* has a cause of action against *B* for malicious prosecution and a separate and totally unrelated cause of action against *C* for assault and battery. The problem becomes one of multiple parties as well as of multiple claims. Rule 51 provides that for claims to be joined, the rules with respect to multiple parties—39, 40, and 43—must be satisfied. It would be necessary to look to those rules with respect to multiple parties even if such express reference was not made by Rule 51. It is now clear that, in a multiple parties-claims situation, the requirements of the rules with respect to both joinder of parties and joinder of claims must be satisfied,[15] for a situation involving multiple parties also involves multiple claims.

Rule 39 deals with compulsory joinder, providing in subdivision (a) as follows:

> Except as otherwise provided in these rules, persons having a joint interest shall be made parties and be joined as plaintiffs. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

Rule 39(a) is taken from Rule 19(a) of the Federal Rules of Civil Procedure, which Professor Moore has pointed out "is a generalized statement concerning necessary and indispensable parties to be read in the light of cases at law and in equity. It was not intended to change the rules governing compulsory joinder that had been laid down in those cases."[16]

Texas Rule 39(b) speaks of ordering persons made parties "who ought to be made parties if complete relief is to be accorded between those already parties," and involves the distinction be-

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lessen the delay, expense and inconvenience to all concerned, and . . . have emphasized that separate trials should not be ordered unless such a disposition is clearly necessary." 5 MOORE'S FEDERAL PRACTICE (2d ed. 1951) ¶ 42.03.

[15] The failure to appreciate the relationship between rules governing joinder of parties and joinder of claims culminated in New York in Ader v. Blau, 241 N. Y. 7, 148 N. E. 771 (1925). See Great Northern Telegraph Co., Ltd. v. Yokohama Specie Bank, Ltd., 297 N. Y. 135, 76 N. E. 2d 117 (1947); CLARK, *op. cit. supra* note 6, at 390-392; 3 MOORE'S *op. cit. supra* note 4, ¶ 20.04.

[16] 3 MOORE'S *op. cit. supra* note 4, ¶ 19.05[1].

tween indispensable and "conditionally necessary" parties.[17] That distinction is important only with respect to failure to join;[18] and it would seem rather clear that situation (b) is not one of compulsory joinder.

A joinder of parties may of course be *permitted* under Texas Rule 40(a), even though the relationship of the parties is not

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[17] The term "conditionally necessary" seems to have been originated and popularized by Professor Moore, to the point that it can almost be considered part of the rule itself, at least with respect to Federal Rule 19(b). See 2 MOORE'S FEDERAL PRACTICE (1st ed. 1938) 2134-2137. Judge Stayton has coined the word "insistible" to refer to parties who ought to be brought in under compulsory joinder provisions so that complete relief may be accorded between those already parties, even though they are not indispensable parties. See Note, 24 Tex. L. Rev. 511 (1946). That this distinction between indispensable and "conditionally necessary" or "insistible" parties must be made in Texas under Rule 39 is clearly recognized by Brown v. Meyers, 163 S.W.2d 886 (Tex. Civ. App. 1942) *er. ref. w.o.m. But cf.* Hicks v. Southwestern Settlement and Development Corp., 188 S. W. 2d 915 (Tex. Civ. App. 1945) *er. ref. w.o.m.*, 24 Tex. L. Rev. 511 (1946).

Prior to adoption of the Texas Rules, the courts used the term "necessary" to refer to an indispensable party and "proper" at least in some instances to refer to a person who could be brought in on timely objection but whose absence could be waived. See, *e.g.*, Biggs v. Miller, 147 S.W. 632 (Tex. Civ. App. 1912); Bingham v. Graham, 220 S. W. 105 (Tex. Civ. App. 1920); TOWNES' TEXAS PLEADING (2d ed. 1913) 288. Despite the fact that a party formerly considered a "proper" party in that sense would now seem to be a "conditionally necessary" party, and a "proper" party is now one who may be permissively joined under Rule 40(a), the term "necessary" is still being used in the restrictive sense of "indispensable." See, *e.g.*, Simmons v. Wilson, 216 S. W. 2d 847 (Tex. Civ. App. 1949). There is going to be confusion on this score in the Texas cases until the courts more clearly define the terminology which they are using. This confusion may be due in part to the adoption, without change, of TEX. REV. CIV. STAT. (VERNON, 1936) Art. 1992 as Rule 37, which provides:

> Before a case is called for trial, additional parties, necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but not at a time nor in a manner to unreasonably delay the trial of the case.

Despite the wording of Rule 37, it seems clear that a necessary, in the sense of indispensable, party must be brought in, regardless of when his absence is noted. *Cf.* Hudson Underwriters Agency of Franklin Fire Ins. Co. v. Ablon, 203 S. W. 2d 584 (Tex. Civ. App. 1947) *er. dism.* In adopting Federal Rule 19(b), the words in the first sentence thereof—"who are not indispensable, but"—were omitted from Texas Rule 39(b). It has been suggested that omission of this reference destroys "the implication against any action whatsoever without the indispensable parties." Clark, *op. cit. supra* note 6, at 362, n. 60. *But see* Brown v. Meyers; Simmons v. Wilson, *supra.* The words "necessary or proper" in Article 1992, now Rule 37, were given a very flexible interpretation. And the situation is further confused by the use of the word "necessary" in Subdivision 29a of Article 1995 of TEX. REV. CIV. STAT. (VERNON, 1948). See discussion under Part II *infra.*

[18] *I.e.*, whether the court may proceed in the absence of such party, even though jurisdiction cannot be obtained over him or bringing him in would unreasonably delay the proceedings.

such that their joinder is compulsory under Rule 39. With respect to permissive joinder, Rule 40(a) provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.[19]

The causes of action for malicious prosecution and assault and battery set forth in situation (b) involving neither "the same transaction, occurrence, or series of transactions or occurrences"[20] nor any common question of law or fact,[21] Rule 40(a) obviously does not permit their joinder.

It is even more clear that Rule 43 is inapplicable. Interpleader, the subject of Rule 43, involves a situation of conflicting claims to the same property or obligation, and is the procedural device developed in equity to compel the litigation in one action of such conflicting claims, so as to avoid double vexation and double liability.

Suppose that *A*, disregarding the quite apparent lack of authority for joinder of his causes of action against *B* and *C*, as set forth in situation (b) above, nevertheless goes ahead and does join

[19] Rule 40(b) makes provision for separate trials. See note 12 *supra.*

[20] This is a very expansive concept, which requires merely that there be a series of somewhat connected or related events. See Akely v. Kinnicutt, 238 N. Y. 466, 144 N. E. 682 (1924); Great Northern Telegraph Company, Ltd. v. Yokohama Specie Bank, Ltd., 297 N. Y. 135, 76 N. E. 2d 117 (1947); 3 MOORE'S *op. cit. supra* note 4, ¶s 20.02-20.04.

[21] Obviously, Rule 40(a) does not require that all of the questions of law or fact be common to each party. All that is required is that the claims of or against the various parties involve some common questions of importance.

them in a single petition against *B* and *C*. There is a misjoinder of parties; the misjoinder of parties creates a misjoinder of claims under Rule 51. Texas Rule 41 comes into play, for Rule 41 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The court should sever the causes of action against *B* and *C*, ordering that each be docketed as a separate suit.

(c) *A* has a cause of action against *B* and *C* on a note executed jointly by them, and another cause of action upon a separate and entirely unrelated note executed jointly by *B*, *C*, and *D*. May *A* join both of these causes of action in one action against *B*, *C*, and *D*? *D* is not concerned with the cause of action solely against *B* and *C*, there are no common questions of law or fact, and the joinder of both causes of action in one petition would be improper. However, if the causes of action are joined, the court should sever the cause of action against *B* and *C* from the cause of action against *B*, *C*, and *D*, ordering that each be docketed as a separate suit.[22] Of course, if the two causes of action were so related as to be within the scope of Rule 40(a), it would be immaterial that *D* is not concerned with the cause of action against *B* and *C*. Note that under that rule a "defendant need not be interested in . . . defending against all the relief demanded. Judgment may be given . . . against one or more defendants according to their respective liabilities."

(d) *A*, *B*, *C*, and *D* each have a cause of action against *E* for

[22] See Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).

labor and material separately furnished by each of them to *E* in the building of a house by *E*. *F* has a deed of trust to the house and lot, executed to him by *E* while the house was under construction. *F* claims that his lien is superior to those of *A*, *B*, *C*, and *D*, who dispute *F's* claim of priority. May *A*, *B*, *C*, and *D* join together as plaintiffs in one action to foreclose their respective mechanics' and materialmen's liens upon *E's* property, joining *E* and *F* as defendants? The joinder of *A*, *B*, *C*, and *D* as co-plaintiffs is proper under Rule 40(a), for the "liens arose by reason of a series of transactions in which common questions of law and fact were involved."[23]

Similarly, *F*, claiming a superior right denied by *A*, *B*, *C*, and *D*, is at least a proper party to the action under Rule 40(a), and indeed may be a necessary party under Rule 39.[24] *F*, properly joined as a co-defendant in the action by *A*, *B*, *C*, and *D*, may assert his claim to priority in that action and seek foreclosure of his deed of trust by counterclaim under Rule 97.[25]

(e) *A* has a lake on his land which is supplied with water from slopes and drains west of his land. *B* has a salt water line on the south side of the draw through which draw water flows into *A's* lake. *B* negligently permits his line to break, and as a result salt water being pumped through *B's* line escapes and runs by natural drainage into *A's* lake. On the north side of the draw *C* has an oil well and pipe line through which *C* pumps oil and salt water. About the same time of *B's* negligence, *C* also negligently permits his line to become broken and his oil and salt water to escape and run into *A's* lake. *A* wishes to enjoin *B* and *C* so as to prevent further pollution of his lake; he of course also desires damages for

[23] Tomlinson v. Higginbotham Bros. & Co., 229 S. W. 2d 920, 923 (Tex. Civ. App. 1950) *er. ref.*

[24] *See* Biggs v. Southland Life Ins. Co., 150 S. W. 2d 149 (Tex. Civ. App. 1941); *cf.* Williams v. Coleman-Fulton Pasture Co., 157 S. W. 2d 995 (Tex. Civ. App. 1942) *er. ref. w.o.m.*; *see also* Parker v. Chambers, 159 S. W. 2d 945 (Tex .Civ. App. 1942).

[25] Query, whether his counterclaim for foreclosure would be compulsory under Rule 97(a) or only permissive under Rule 97(b)?

the harm already done. May *A* seek all of this relief in one action against *B* and *C*?

It was held that *B* and *C* are not liable jointly for all of *A's* damages in *Sun Oil Company v. Robicheaux*, [26] decided in 1930. There, plaintiffs, a landlord and his tenant, sued various oil producers jointly to recover damages for alleged loss of crops resulting from salt water being drained onto the property. The court held,

> [A]n action at law for damages for tort cannot be maintained against several defendants jointly, when each acted independently of the others and there was no concert or unity of design between them. In such a case the tort of each defendant is several when committed, and it does not become joint because afterwards its consequences, united with the consequences of several other torts committed by other persons in producing damages. Under such circumstances, each tortfeasor is liable only for the part of the injury or damages caused by his own wrong; that is, where a person contributes to an injury along with others, he must respond in damages, but if he acts independently, and not in concert of action with other persons in causing such injury, he is liable only for the damages which directly and proximately result from his own act, and the fact that it may be difficult to define the damages caused by the wrongful act of each person who independently contributed to the final result does not affect the rule .... On the other hand, where several wrongdoers act independently of each other in producing the same consequence, the equitable remedy of injunction may be resorted to by the person injured, to abate the nuisance or injury.[27]

Sun Oil Co. v. Robicheaux was expressly overruled by the Texas Supreme Court in the very recent case of *Landers v. East Texas Salt Water Disposal Co.*[28] The court held that in such a situation the defendants are jointly and severally liable for all of the damages sustained by the plaintiff. Therefore, today it is clear that in the example given, *B* and *C* can be properly joined as co-

[26] 23 S. W. 2d 713 (Tex. Comm. App. 1930).

[27] *Id.* at 715.

[28] 21 Tex. Sup. Ct. 285 (1952). Justices Garwood and Smedley dissented.

defendants. However, even if the rule still existed that each defendant is only liable for the damages caused by his own act, the situation would be an eminently proper one for permissive joinder under Texas Rule 40 (a) despite the contrary holding of the court of civil appeals in the *Landers* case.[28a] The mere fact that liability is several clearly does not preclude joinder under Rule 40 (a). All that is required is that there be common questions of law or fact, which of course exist when there is doubt as to which of several defendants is liable, and that there be a series of related transactions or occurrences.[28b] Judgment may be given against each defendant to the extent of his liability.

(f) *A* operates a tractor for *B*, *C*, and *D*, all of whom are engaged in heavy excavation work. *B*, *C*, and *D* severally rent the tractor and have separate contracts of employment with *A*. *A* is killed while operating the tractor, but it is uncertain whether he was working for *B*, *C*, or *D* at the time. In an action under the Texas workmen's compensation law, may the compensation carriers of *B*, *C*, and *D* be joined as defendants in the alternative, in one action? In *Texas Employers Insurance Ass'n v. Felt*,[29] an action removed to the federal court from a Texas state court, such joinder of the various compensation carriers as defendants in the alternative was upheld. The court noted that joinder would be proper under either Federal Rule 20 or Texas Rule 40 (which was derived without change from Federal Rule 20), and further pointed out that the federal rule

> ... *did not create joint liability. The permitted joinder is procedural and not substantive.*

[28a] 242 S.W. 2d 236 (1951).

[28b] See note 20 *supra*. Justice Garwood, who wrote a dissenting opinion in the *Landers* case, thought it clear that Rule 40(a) permitted joinder of the defendants. He disagreed with the prevailing opinion in that he did not believe there was necessity for overruling the *Robicheaux* case. Justice Garwood thought that only the procedural point was before the court, and he was "far from sure that the Robicheaux case or any other decision from this state would operate to deny the pliantiff a full recovery against both defendants jointly and severally." 21 Tex. Sup. Ct. at 289, 290.

[29] 150 F. 2d 227 (5th Cir. 1945).

> A better illustration of the procedural advantage of the right to seek alternative relief in one action against several defendants could scarcely be found than the very case before us.... Without this remedy, three trials before different juries ... might have been necessary. If all the defendants had been citizens of Texas, this suit would have remained in the state court and *have been triable in one action.* ... [T]here is no procedural reason why a single suit may not be maintained in the federal court if the plaintiff's right to relief arises out of the same transaction and presents a question of law or fact common to all of the defendants....
>
> ... [H]ere the optional joinder is only procedural; the right remains several. There was only one cause of action, one claim for compensation under the law and the facts, but there were three separate controversies with the defendants as to which of them was bound to pay the amount claimed. These several controversies, within the rules of pleading, were united in one action and tried together....[30]

This decision by the Court of Appeals for the Fifth Circuit is typical of the approach in the federal courts towards problems of permissive joinder under a rule *worded* the same as that of Texas.[31]

(g) *A*, who has duly qualified as community survivor, has a cause of action against *B* for rents upon her separate property, and also claims damages against *B* for part of such property either returned in a damaged condition or not returned at all. *A* is not certain what portion of the recovery against *B* for the rents and damages would belong to the community estate, and which portion to her individually. May *A* institute an action in a dual capacity, individually and as community survivor, to recover both the rents and damages in one action? Such a joinder by the plaintiff in the alternative is permitted by Rule 40(a), and was upheld in *James v. Perry.*[32]

(h) *A* places a deed in the hands of *B* with instructions to *B* to

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[30] *Id.* at 231, 232. Emphasis added.

[31] Experience has, of course, shown that judicial interpretation may emasculate even the most clearly worded of rules, and this, despite the clarity of the background of the rule.

[32] 208 S. W. 2d 145 (Tex. Civ. App. 1948) *er. ref. n.r.e.*

deliver the deed to *C* upon payment of the named consideration. *B* so notifies *C*. Before *C* acts, however, *A* telegraphs *B* to hold the deed until further word from him. A few days later *B* writes *A* for further instructions, but receives no reply. *C* then demands the deed from *B* and tenders the necessary consideration. *B* refuses to deliver the deed to *C* in view of *A's* telegram. Then *A* instructs *B* to deliver the deed to his attorneys. In view of the conflicting claims by *A* and *C* to the deed, may *B* institute an action against *A* and *C* to determine which one is entitled to it? Rule 43 permits *B* to institute such an action, an action of interpleader,[33] as was held in *Security State Bank of Pharr v. Shanley*.[34] In that case the trial court had ruled that the interpleader should be dismissed because *B* was the agent of *A*, and an agent cannot interplead his principal. However, this lower court holding overlooked the fact that Texas Rule 43 is taken without substantial change from Federal Rule 22(1). The Federal Rules treat interpleader simply as another multiple parties-claims situation, and the remedy as it developed in equity is greatly liberalized by Rule 22(1).[35]

It will be noted that Rule 43 expressly states that its provisions "supplement and do not in any way limit the joinder of parties permitted in any other rules." The rule thus merely provides for interpleader relief as the converse of Rule 40(a), which it has been seen permits several persons to be joined as defendants in the alternative where doubt exists as to who is liable. Even without

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[33] Rule 43 provides:
Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

[34] 182 S. W. 2d 136 (Tex. Civ. App. 1944).

[35] See Security State Bank of Pharr v. Shanley, *ibid;* Franklin Life Ins. Co. v. Greer, 219 S. W. 2d 137 (Tex. Civ. App. 1949); Frumer, *op. cit. supra* note 9, at 767, 768.

Rule 43 an interpleader result can be accomplished under Rule 40(a), by joinder of the conflicting claimants as defendants in an action for declaratory judgment.[36] And the argument can be made that in a conflicting claims-interpleader situation, the claimants are all necessary parties to an action involving the property or obligation in dispute.[37]

Suppose, in situation (h) above, that *C* brings an action against *B* for delivery of the deed, before *B* has instituted an action of interpleader. *B* wants to bring *A* into *C's* action. It is necessary to look to Rule 97, for Rule 43 provides, "A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." The situation is not one for a cross-claim, for under Rule 97(e) a cross-claim is a claim asserted by a party against a co-party, that is, against a person already in the action. *B* therefore will want to file a counterclaim for interpleader,[38] and *C* may be brought into the action under Rule 97(h), which provides in part:

> When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim . . ., the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained. . . .

Note the similarity in wording between the above-quoted portion of Rule 97 (h) and the wording of Rule 39(b) with respect to "conditionally necessary" parties, Rule 39(b) providing that persons should be made parties "if complete relief is to be accorded between those already parties."[39]

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[36] See Borchard, *The Next Step Beyond Equity—The Declaratory Decree*, 13 U. of Chi. L. Rev. 145, 171 (1946). *Cf.* ANDERSON, DECLARATORY JUDGMENTS (1st ed. 1940) § 112.

[37] There can be a problem, at least under the federal provisions, as to whether a situation is one for compulsory joinder rather than interpleader. See, *e.g.*, Jarvis v. Sun Oil Co., 7 F. R. D. 50 (S. D. N. Y. 1947); *cf.* Steingut v. National City Bank, 38 F. Supp. 451 (S. D. N. Y. 1941). See Frumer, *op. cit. supra* note 9, at 792, 793.

[38] See Frumer, *op. cit. supra* note 9, at 797, 798.

[39] The Rule 97(h) phraseology, derived from Federal Rule 13(h), has been given a broader meaning in the federal courts than the Rule 39(b) phraseology, derived from

Assume that *C* brings an action against *B* for delivery of the deed, and *B* does not attempt to interplead *A*. It would seem clear that *A* may intervene. The Texas Rules of Civil Procedure did not make any change with respect to the right of intervention,[40] and Rule 60 provides in part:

> Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party. . . .

Intervention, of course, involves the idea that a person may have such an interest in a particular controversy that he should be permitted to come into the action on his own motion, even though no complaint with respect to his absence has been made by anyone already a party to the action.[41]

Suppose that *A* and *C* bring separate actions against *B* for delivery of the deed. The actions may be consolidated or tried together. Rule 41 provides in part that "suits filed separately may be consolidated," and Rule 174(a) provides:

> Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[42]

Federal Rule 19(b). Federal Rule 13(h) has been interpreted to permit the bringing in of a "proper" party (under Federal Rule 20(a)) to a counterclaim. Delia Plastering Co., Ltd. v. D. H. Dave, Inc., 15 F. R. Serv. 13h.11, case 1 (N. D. Ohio, 1951); *see also* United States to use of Jones Construction Co. v. Skilken, 53 F. Supp. 14 (N. D. Ohio, 1943).

[40] Rule 60 was derived from former TEX. REV. CIV. STAT. (VERNON, 1936) art. 1998, with the change that intervention was authorized without leave of court (subject to subsequent objection of course), regardless of whether the court is in session or in vacation. Actually, the Texas courts have been quite liberal with respect to intervention. See, *e.g.*, Jones v. English, 235 S. W. 2d 238 (Tex. Civ. App. 1950) *er. dism.*; Gullo v. City of West University Place, 214 S. W. 2d 851 (Tex. Civ. App. 1948) *er. dism.*

[41] *Cf.* Hudson Underwriters Agency of Franklin Fire Ins. Co. v. Ablon, 203 S. W. 2d 584 (Tex. Civ. App. 1947) *er. dism.*, where the trial court required an outsider to intervene!

[42] Formerly, under TEX. REV. CIV. STAT. (VERNON, 1936) art. 2160, now repealed, actions could not be consolidated unless they were joinable in the first instance. See Hallam v. Moore, 126 S. W. 908 (Tex. Civ. App. 1910) *er. ref.* Rule 174(a) requires only that there be common questions of law or fact, having been derived without change from Federal Rule 42(a). See generally 5 MOORE'S *op. cit. supra* note 14, ¶ 42.02; Note, 20 Tex. L. Rev. 501 (1942).

The Texas consolidation provision gives to the trial court discretion "to cause one lawsuit to take the place of two or three. This is not only a saving in time, trouble, and expense to the parties and the state, but a preventive of the injustice which may result from divergent decisions in each separate case."[48]

Finally, *C* may bring an action against *B* for delivery of the deed and join *A* as a co-defendant, obtaining a declaration as against *A* that *A* is not entitled to return of the deed. Such a joinder, probably permissive under Rule 40(a), would not only fully protect *B*, but would also preclude the possibility of a subsequent action by *A* against *C*.

Situation (h) above is an excellent illustration of the generalization that the various rules with respect to multiple parties-claims complement each other, and that the particular rule applicable may depend upon the manner in which a given situation develops. The eventual and desired result—the determination of the claims of *A* and *C* to the deed in one action—may be the same even though achieved through interpleader under Rule 43, or a counterclaim for interpleader under Rule 97 as authorized by Rule 43, or intervention under Rule 60, or consolidation under Rules 41 and 174(a), or permissive joinder under Rule 40(a), or perhaps even compulsory joinder under Rule 39. And the eventual result may be the same despite these various possibilities because the thread of the same basic procedural principle runs through all of these rules.

(g) A truck owned by *A* collides with a bus owned by *B* and operated by *C*, injuring *D* and *E*, passengers in the bus. Such a situation also presents a number of possibilities from the standpoint of multiple parties-claims. *D* and *E* may of course institute separate actions against *B*, or they can join together as plaintiffs in a single action against *B* under Rule 40(a), for their causes of action arose out of the same occurrence and involve common questions of law and fact. For the same reasons, *D* and *E* can in

[48] CLARK, *op. cit. supra* note 6, at 493.

separate actions join *A* and *B* as joint tort-feasors, or *D* and *E* can join together as co-plaintiffs in an action against *A* and *B* as co-defendants. *C* may also, of course, be made a defendant in any such action or actions.[44] If several suits are filed under any of these possible combinations, Rule 174(a), dealing with consolidation, must again be considered.[45] Also, *D* may be able to intervene in an action filed by *E* against *A* and/or *B* and/or *C*.[46]

Assume that *A* and *B* are joined as co-defendants. The right to contribution under Article 2212, *Texas Revised Civil Statutes (Vernon, 1948)*, may be asserted by way of cross-claim, for Rule 97(e) provides:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Thus, *A*, for example, may not only assert a claim for contribution against *B*, but he can also allege that he was not negligent and seek a judgment for his own damages against *B*.[47]

Assume that *B* is sued alone as a defendant. He desires to assert a claim for contribution against *A*. He will turn to Rule 38, for Rule 38 provides in part:

> A defendant, on notice to the plaintiff, may ask leave of the court to file a cross-action against a person not a party to the action who

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[44] Whether or not as a matter of tactics *C*, the driver, should be made a defendant is of course another question, not within the scope of this article. However, if *C* is not made a defendant, there is the possibility that he will be impleaded into the action.

[45] See Morgan v. Woodruff, 208 S. W. 2d 628 (Tex. Civ. App. 1948).

[46] See note 40 *supra*.

[47] In respect to assertion of an independent claim for damages arising out of the same collision, Rule 97(e), derived from Federal Rule 13(e), may be broader than Rule 38, derived from Federal Rule 14. For dictum that Federal Rule 14 can be used only to bring in a third-party defendant to assert a claim for exoneration, see Liberty Mutual Insurance Co. v. Vallendingham, 94 F. Supp. 17 (D. D. C. 1950). Of course, if the plaintiff amends and makes the third-party defendant a defendant to his cause of action, a cross-claim could then be asserted against the third-party defendant. 3 MOORE'S *op. cit. supra* note 4, ¶ 14.17; Tripp, *Some Observations on Motion Practice in New York*, 2 Syracuse L. Rev. 273, 288, n. 120 (1951).

> is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against the defendant....

Impleader or third-party practice, under Rule 38, permits the determination of ultimate rights in the same action in which the primary right is determined; that is, additional parties may be brought in so that a secondary claim for indemnity or contribution may be determined in the same action as the primary claim which underlies such secondary claim for exoneration. Thus, where *A* sues *B*, and *B* impleads *C*, *B* is saying, "If I am liable to *A*, then *C* is liable over to me."[48] Yet, a cross-claim under Rule 97(e), numerically many rules removed from Rule 38, may be used to accomplish the same purpose where the indemnitor is already a co-party in the action. And compare the theory of impleader with that of a counterclaim for interpleader, where a third party is also brought into the action in order, once again, that ultimate rights may be determined in one action. Consider also the correlation of these rules with Rule 39, the compulsory joinder rule, which may require that additional parties be brought into the action.

It is hoped that the foregoing situations, which could be added to *ad infinitum*,[49] suffice to show the similarity of procedural principle underlying all of the various Texas Rules relating to multiple parties-claims. A recognition of that similarity of principle will not only assist the court in the decision of problems involving

[48] While prior to adoption of the Texas Rules, the Texas statutes expressly authorized impleader only in one specific situation, that of a warrantor in an action of trespass to try title (TEX. REV. CIV. STAT. (VERNON, 1936) art. 7368, now Rule 786), the Texas courts had developed a third-party practice under TEX. REV. CIV. STAT. (VERNON, 1936) art. 1992, now Rule 37. See Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties*, 33 Col. L. Rev. 1147, 1151 (1933). TEX. REV. CIV. STAT. (VERNON, 1948) art. 2212 was even construed to permit impleader of a joint tort-feasor. Lottman v. Cuilla, 288 S. W. 123 (Tex. Comm. App. 1926). Rule 38 does not abrogate the practice of "vouching-in," whereby a person who may be ultimately liable is notified of pendency of the action and is given the opportunity to come in and defend. Old Nat. Life Ins. Co. v. Bibbs, 184 S. W. 2d 313 (Tex. Civ. App. 1944) *er. ref. w.o.m.*; Butler v. Continental Oil Co., 182 S. W. 2d 843 (Tex. Civ. App. 1944). However, although a person properly so notified is bound by the result of the action, a second action is necessary in order to obtain judgment against him. Cohen, *supra*, at 1147-1150.

Impleader under Rule 38 is subject to venue limitations. See Part II *infra*.

[49] With respect to the class suit, see Part II *infra*.

multiple parties-claims,[50] but also enables the attorney to utilize fully all rules which may be of advantage to his client.

II. Areas Remaining for Study and Improvement

The reported decisions under the Texas Rules lend additional support, if such were needed, to the criticisms made by Judge Charles E. Clark some years ago with respect to restrictions in the rules governing multiple parties and claims.

Texas Rule 97(g) provides,

> Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same.

Judge Clark pointed out that this provision "goes against the whole spirit of modern joinder, which is that all points of irritation among the parties may (and even perhaps should) be brought out into the open and disposed of at one time, as a matter of convenience to the court and the parties, and as a sound policy to end litigation among them as promptly as possible. And it brings back old procedural confusion by limiting adjudication within the confines of certain procedural forms which turn upon definitions not clear and precise in themselves."[51]

In *Southern Medical & Hospital Service v. Buie-Allen Hospital*[52] plaintiffs twice sued the defendant in the Justice Court, Falls County, to recover hospital fees on a policy issued by the defendant. Each time the action was ordered transferred to the Justice Court, McLennan County, on plea of privilege by the de-

[50] The writer certainly does not wish to give the impression that he feels that the Texas courts have been unaware of that similarity of principle. Most of the decisions indicate that they are fully aware of the principles underlying the various rules with respect to multiple parties-claims. However, some opinions do indicate that the courts are troubled by cases decided before adoption of the Texas Rules, cases involving restrictions which have been eliminated by the Rules. And the writer does believe that the Texas courts have been over-willing in the granting of severance and separate trials. See note 10 *supra.*

[51] Clark, *op. cit. supra* note 1, at 8, 9.

[52] 204 S. W. 2d 996 (Tex. Civ. App. 1947).

fendant. The second time the action was transferred, the defendant filed a cross-action against the plaintiffs for malicious prosecution, based upon the refiling of the action in Falls County after the plea of privilege had been sustained the first time. Plaintiffs filed a plea of privilege to the cross-action. The court of civil appeals, quoting Rule 97(g), held that the counterclaim was based on a "specific tort" and said,

> It is clear to us that plaintiff's suit was based on a contract and that defendants' claimed cross-action is based on a tort, and that the trial court correctly sustained plaintiff's plea of privilege to defendants' asserted cross-action.[53]

In the opinion of the writer, this case is an excellent example of what Judge Clark had in mind in his criticism of Rule 97(g). Of course, the case ties in with the complex Texas venue provisions, which are among the most, if not the most, intricate in this country, which leads to the criticism made by Judge Clark of the "incorporation of strict venue provisions into third-party practice. . . ."[54]

Rule 38(d) provides with respect to the third-party practice rule:

> This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

In *Union Bus Lines v. Byrd*[55] a truck owned by *A* collided with a bus owned by *B*, injuring *C* and *D*, passengers in the bus. The collision occurred in Live Oak County. *C* and *D* brought separate suits in Cameron County against *B* for damages sustained by them. Cameron County was not *B's* residence, nor the home office of the bus company operated by him, but venue of plaintiff's suits as against *B* was sustainable in Cameron County on the ground that the bus line operated as a common carrier in the

[53] *Id.* at 999. See also Waller Peanut Co. v. Lee County Peanut Co., 217 S. W. 2d 183 (Tex. Civ. App. 1949) *semble.*

[54] Clark, *op. cit. supra* note 1, at 10.

[55] 142 Tex. 257, 177 S. W. 2d 774 (1944). *See also* Service Mut. Ins. Co. v. Erskine, 169 S. W. 2d 731 (Tex. Civ. App. 1943). *Cf.* Zachry v. Robertson, 210 S. W. 2d 466 (Tex. Civ. App. 1948).

county and had an agent therein. *B* filed a cross-action in each suit under Rule 38 against *A* for contribution in the event that judgment should be rendered against him, *B*. *A* filed a plea of privilege to each cross-action, to be sued in Bexar County, its residence. There was no independent ground of venue as to *A*. After reaching the conclusion that the right of contribution under Article 2212, *Texas Revised Civil Statutes (Vernon, 1948)* may be asserted in an independent action, and that the cross-action was distinct and severable from the main suit, the supreme court held that venue of the cross-action could not be retained in Cameron County. The court's opinion indicates that this is a matter for legislative correction, rather than simply a question of desirability of retention of Rule 38(d), for the court noted:

> It may be conceded that it would be more convenient to try the controversy among all the parties in a single suit. Certainly it would avoid a multiplicity of suits. But in view of the positive provisions of Article 1995 [*Texas Revised Civil Statutes (Vernon, 1948)*] to the effect that no person shall be sued out of the county of his domicile, except in the instances therein named, we would not be justified in engrafting an additional exception to the statute merely to avoid a multiplicity of suits.[56]

Regardless of the relative distances involved, if in the *Union Bus* case, *A* and *B* had been joined as defendants and venue had been laid in the county of the residence of either, the other could not have made complaint. Subdivision 4 of Article 1995, *Texas Revised Civil Statutes (Vernon, 1948)*, provides in part,

> If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides . . .

That provision has been given a liberal interpretation.[57] And, if *A* and *B* had been joined as defendants, *B* could, of course, have

[56] 142 Tex. at 261, 177 S. W. 2d at 776.

[57] Cobb v. Barber, 92 Tex. 309, 47 S. W. 963 (1898); Middlebrook v. David Bradley Mfg. Co., 86 Tex. 706, 26 S. W. 935 (1898). But compare the rule that under that subdivision, each element of the cause of action is a venue fact. Crawford v. Sanger, 160 S. W. 2d 115 (Tex. Civ. App. 1942).

filed a cross-claim for contribution, as has been previously discussed.

However, the venue provisions operate to limit free joinder of defendants where the suit is not brought in the county where one of them resides. Subdivision 29a of Article 1995 provides:

> Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants, then such suit may be maintained in such county against any and all *necessary* parties thereto.[58]

As interpreted in *Pioneer Building & Loan Ass'n v. Gray*,[59] Subdivision 29a "deals only with suits brought outside the county of the domicile of any defendant, but which are maintainable where brought against one defendant under some other exception"[60] of Article 1995. The court further held in the *Pioneer* case that "every party whose joinder in the suit is necessary to the securing of full relief in 'such suit' is a necessary party in the sense that term is used in subdivision 29a."[61] This definition of "necessary" party for purposes of Subdivision 29a would seem substantially equivalent to that of "conditionally necessary" party under the compulsory joinder rule, Rule 39.[62]

The restrictive holding in *Long v. City of Wichita Falls*[63] that the joinder of plaintiffs under Rule 40(a) is limited by the jurisdictional amount requirement, and that the claim of each must satisfy that requirement, was overcome by enactment in 1945 of Article 1906a, *Texas Revised Civil Statutes (Vernon, 1948)*, which provides in part:

> Where two or more persons originally and properly join in one suit, the suit for jurisdictional purposes shall be treated as if one

[58] Italics added.

[59] 125 S. W. 2d 284 (Tex. Comm. App. 1939). See also Grimes v. McCrary, 211 S. W. 2d 1005 (Tex. Civ. App. 1948).

[60] *Id.* at 286.

[61] *Id.* at 287.

[62] See note 17 *supra*; Note, 26 Tex. L. Rev. 233 (1947).

[63] 142 Tex. 202, 176 S. W. 2d 936 (1944).

party were suing for the aggregate amount of all their claims added together, exclusive of interest and costs. . . .[64]

Judge Clark also strongly criticized the provision in Rule 38(c) that "[t]his rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged." Substantially the same provision is also set forth in Rule 97(g). Judge Clark made the point that

> . . . this is a quite usual type of situation to which the third-party rule is made applicable, and there seems no good reason for denying it here. The Texas rule does include the novel feature of the federal rule introducing the additional concept of liability not only to the defendant, but also to *the plaintiff*, a feature of the rule which has been little used and the implications of which are not wholly clear.[65] But its inclusion affords no reason for this restriction. Possibly there may be some thought of unfair prejudice to an insurance company before a jury, and so on; but that is completely taken care of, as experience elsewhere demonstrates, by the provision for separate trials in Rules 97(h) and 174(b).[66]

Rule 38(a) adopted the wording of Federal Rule 14, which authorizes impleader of a person "who is *or may be* liable." Thus, under Federal Rule 14 and Texas Rule 38(a), a person may be brought in as a third-party defendant even though the existence of

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[64] See Lincoln v. Harvey, 191 S. W. 2d 746 (Tex. Civ. App. 1945); *cf.* Means v. Marshall, 220 S. W. 2d 680 (Tex. Civ. App. 1949) (in action in county court to recover assessment levied against two defendants severally, the amount prayed as to each defendant held to control, and the county court had jurisdiction even though total amount sought was in excess of the court's jurisdiction); Thompson v. A. J. Tebbe & Sons Co., 241 S. W. 2d 633 (Tex. Civ. App. 1951) (district court retained jurisdiction of claim which had been severed and docketed as separate suit even though it was less than $500, where the court had had jurisdiction in the first instance by reason of proper joinder of claims).

There are, however, some problems with respect to jurisdiction of counterclaims which merit study. See Moritz v. Byerly, 185 S. W. 2d 589 (Tex. Civ. App. 1945) *er. ref.*, 24 Tex. L. Rev. 100.

[65] The 1946 amendments to Federal Rule 14 deleted the provision which related to impleading a third party who is or may be liable to the plaintiff. The provision caused confusion and had little utility. 3 MOORE'S *op. cit. supra* note 4, ¶ 14.15.

[66] CLARK, *op. cit. supra* note 1, at 9, 10. For an application of Rule 38(c), see Service Mut. Ins. Co. v. Erskine, 169 S. W. 2d 731 (Tex. Civ. App. 1943).

a claim against him depends on the outcome of the main case, but the court must give judgment in accordance with the substantive rights of the parties. For example, a person who has contracted to indemnify defendant against loss may be brought in as a third-party defendant even though he will not be liable until defendant has been found liable and has paid the judgment, but any judgment against the third party in favor of the defendant must be conditioned on the defendant's first having satisfied his own liability to the plaintiff.[67] However, Federal Rule 14 has been interpreted to permit an insurer to be impleaded,[68] which means that the defendant in a federal court action in Texas may possess a procedural advantage which he does not have in the Texas state court.[69] In view of the ample safeguards by way of severance and separate trials, as noted by Judge Clark, and the practical consideration that juries today are pretty well aware that in most cases there is insurance, it may be questioned whether the Texas limitation merits retention.

One area in which Texas solved no problems by adoption of the Federal Rule is that of the class suit. Texas Rule 42 is substantially derived from Federal Rule 23. Federal Rule 23(a)(3) permits a class suit when the rights involved are "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Such a provision actually has no place in state practice, where there are liberal permissive joinder devices. Federal Rule 23(a)(3) was primarily designed "as a jurisdictional device to allow members of the spurious class to intervene in a diversity suit, although complete diversity would not have existed had they been original parties."[70] The federal courts have themselves been troubled by Federal Rule 23(a)(3).[71]

[67] 3 MOORE'S *op. cit. supra* note 4, ¶s 14.08, 14.10.

[68] *Id.*, ¶ 14.12; see also Note, 2 Syracuse L. Rev. 379 (1951).

[69] Unless, of course, this should be held a matter of substance under Erie R. Co. v. Tompkins, 304 U. S. 64 (1938).

[70] Note, 55 Yale L. J. 831, 832 (1946).

[71] See Kainz v. Anheuser-Busch, 16 F. R. Serv. 23a.33, case 4 (7th Cir. 1952), reviewing the authorities and pointing out that Federal Rule 23(a) (3) is actually only

The class suit, insofar as Texas practice is concerned, should be restricted to the situations where joinder of all of the members of the class would be compulsory if an action involving their rights were not brought as a class suit.[72]

At the present time it is not clear whether an appeal to the district court for a trial *de novo* of a bill of review in the probate court to annul an order for the sale of land may be consolidated with an action in the district court to try the purchaser's right.[73] This problem, as well as consolidation generally of suits pending in lower courts with district court actions,[74] merits study.

CONCLUSION

Texas practice has not stood still since adoption of the Texas Rules in 1941. Important advances have been made in some areas, such as adoption of the summary judgment rule. There has, however, been no change in the rules with respect to multiple parties and claims since 1941, and for the most part the troublesome areas have remained troublesome. On the other hand, under the rules as now worded, good results can be accomplished more often than not, if the court keeps in mind the purposes and objectives of those rules. It must be remembered, as stated by the Texas Commission of Appeals some years ago, that

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a permissive joinder device, and that the absent members of the class, in an action under that subdivision, are not bound by the judgment rendered therein; Notes, 46 Col. L. Rev. 818 (1946); 55 Yale L. J. 831 (1946).

[72] Richardson v. Kelly, 144 Tex. 497, 191 S. W. 2d 857 (1945), *cert. denied*, 329 U. S. 798 (1947), a case which in the humble opinion of the writer was erroneously decided, "exposes the insubstantiability of safeguards of due process under . . . a rule [for which Federal Rule 23 is the prototype], when applied to a defendant class in terms of the character of the 'right' and on the basis of adequacy of representation." Note, 46 Col. L. Rev. 818, 832 (1946). *But cf.* Note, 25 Tex. L. Rev. 64 (1946).

The class suit has given rise to a voluminous bibliography. See, *e.g.*, Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn. L. Q. 399 (1934); Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 34 (1937); McLaughlin, *The Mystery of the Representative Suit*, 26 Geo. L. J. 878 (1938); Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi. L. Rev. 684 (1941); Keefe, Levy, and Donovan, *Lee Defeats Ben Hur*, 33 Corn. L. Q. 327 (1948).

[73] See Note, 20 Tex. L. Rev. 501 (1942).

[74] See, *e.g.*, N. Y. CIV. PRAC. ACT § 97.

> It is the general policy of our law (administered in a blended legal and equitable jurisdiction) to have all controversies relating to the same subject-matter settled in one suit so far as that may be done without unduly prejudicing the rights of some of those interested. . . .[75]

and that rules and statutes should be so drafted, and so interpreted, as

> . . . to effectuate the great purpose of avoiding multiplicity of litigation and sequent expense to parties and the public, vexation and turmoil. . . .[76]

[75] Barton v. Farmers' State Bank, 276 S. W. 177, 180 (Tex. Comm. App. 1925).
[76] *Id.* at 180, 181.